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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL MICHAEL RUIZ, Defendant and Appellant.	F056583 (Super. Ct. No. 1088708) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and David A. Lowe, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On June 9, 2005, the Stanislaus County District Attorney charged appellant Paul Michael Ruiz with one count of receiving a stolen vehicle (Pen. Code, § 496d)[1] while

[1] Unless otherwise noted, all statutory references are to the Penal Code.

released on bail or his own recognizance (§ 12022.1) with a prior serious felony conviction (§ 667, subd. (d)) and a prior prison term (§ 667.5, subd. (b)). On January 2, 2008, the court granted appellant's motion to bifurcate trial of the special allegations. On January 10, 2008, the jury returned a guilty verdict on the substantive count and appellant subsequently admitted the truth of the on-bail, prior conviction and prior prison term allegations. On October 10, 2008, appellant moved for a new trial, alleging his arrest record or "booking sheet" had been sent into the jury room before the rendering of a verdict. On October 24, 2008, the court denied appellant's motion for new trial. On November 21, 2008, the court conducted a sentencing hearing, denied appellant probation, and sentenced in him in four separate cases to a total term of 30 years in state prison. On December 1, 2008, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In 2005, Debra Texeira Brachtenbach owned a red 1994 Saturn automobile (California License No. 4JGY661). On February 18, 2005, Debra's husband, Dave Brachtenbach, parked the Saturn behind the Old Republic Title Company on Coffee Road in the City of Modesto. Mr. Brachtenbach locked the car, went into his workplace, returned 90 minutes later, and discovered the car had been stolen. He immediately reported the theft to the Modesto Police Department.

Ten days later, nurse practitioner Maureen McKibban was driving down Orange Blossom Road, a rural, two-lane roadway in Stanislaus County, at about 7:30 a.m. She followed a white Saturn for about 10 minutes. The Saturn suddenly veered off the roadway and crashed into a power pole near Lancaster Road. The crash caused the pole to fall onto the roadway and block both lanes. McKibban did not see any animals in the roadway, it was not raining, and the Saturn was not traveling at an excessive rate of speed.

McKibban stopped her car and watched appellant and his passenger, Rayanne Hawkins, get out of the Saturn. Appellant rubbed his chest while Hawkins retrieved

something from the back seat. The pair then walked a short distance and sat down. McKibban called 911 and fire and police personnel arrived a short time later.

California Highway Patrol Officer Timothy Green responded to the scene and contacted appellant and Hawkins. The couple was seated next to the roadway. Appellant told Officer Green that Hawkins had been driving the Saturn when a cat crossed the roadway. Appellant said this caused Hawkins to swerve across the oncoming traffic lane and crash into the power pole. Hawkins told Officer Green the same story.

Officer Green continued to speak with appellant and Hawkins and began to notice inconsistencies in their stories. Further, neither appeared concerned about the condition of the vehicle. Green said both of them acted evasively and wanted to leave the scene. As Green asked more questions and pointed out inconsistencies, appellant became "pretty agitated" and attempted to walk away. Officer Green decided to detain the pair for his own safety after appellant became more aggressive with his body movements and vocal tone. He handcuffed both of them, placed appellant in the backseat of the patrol car, and allowed Hawkins to remain outside the police vehicle. Neither detainee could produce a driver's license or other identification, although Hawkins initially introduced herself as Sara Ann Van Winkle.

Officer Green inspected the Saturn, found evidence that appellant had been the driver, and determined that something was amiss with the vehicle. Green noticed the driver's seat was in the "full back" position, which was inconsistent with Hawkins's height. The windshield had been cracked on the passenger side and an "extremely long" light brown hair was stuck to the glass. The strand of hair was consistent with the length and color of Hawkins's hair and inconsistent with appellant's "extremely short" black hair. Green inspected damage to the white front bumper and observed red paint underneath the white exterior paint. He also discovered more red paint along the driver's door jamb and brown paint along the passenger side door and along the trunk.

Green checked the glove box and found a registration card. That card was consistent with the license plate affixed to the Saturn and the public VIN (vehicle identification number) displayed on a tab or plate under the left side of the windshield. Privileged information known to the officer suggested the VIN plate was irregular. Law enforcement officers ultimately discovered the VIN plate and license plate affixed to the Saturn actually corresponded to a 1993 Saturn vehicle.

Officer Green inspected federal information (NITSA) stickers on the vehicle. These were designed to match the public VIN plate under the windshield. The stickers on the passenger door and trunk corresponded to the registration found in the Saturn. However, the stickers on the driver's door and under the hood had been scratched off and removed.[2] Green then summoned a vehicle theft specialist from the Stanislaus County Auto Theft Task Force (STANCATT).

CHP Officer Gisler testified he had been assigned to STANCATT for more than six years. He said STANCATT was charged with investigating automobile theft cases in the area. Gisler inspected the Saturn and noticed the VIN plate under the windshield had "obviously been tampered with." Gisler removed the VIN plate with a knife and noted the plate had been attached with what appeared to be Krazy Glue. He realized the VIN plate on display was "obviously not the proper plate" for the vehicle. Gisler identified the vehicle by locating confidential, alternate identification numbers affixed to the car and running that information through the Department of Motor Vehicles.[3] He concluded the vehicle that crashed into the pole was actually Debra Brachtenbach's 1994 Saturn.

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[2] California Highway Patrol Officer Matthew Gisler described this federal safety sticker as a mylar sticker. He said this type of sticker contains general information as well as information unique to the vehicle. The sticker on the Saturn had been tampered with because the unique identifying information had been peeled off or otherwise removed.

[3] During a pretrial conference, Deputy District Attorney John Goulart reported that car manufacturers mark all their vehicles with confidential VINs so that vehicles can be

Officers searched appellant and Hawkins after their arrest and also searched the Saturn. They found a stamped key bearing the word "Toyota" in the ignition of the vehicle. Officer Gisler said this key was a "shaved" key, meaning it had been altered to start a vehicle other than the one for which it was designed. Gisler noted the key exhibited "obvious" vertical grinding marks that could only have occurred by someone altering or manipulating the key. Officers found four keys on the passenger-side floorboard of the Saturn and Gisler said two of them had been "blatantly" tampered with. Two more shaved keys were discovered in appellant's front pants pocket. Officers found a small knife and bottle of Krazy Glue in Hawkins's purse.

Defense Testimony

Rayanne Hawkins was the sole witness for the defense. Hawkins testified she and appellant met at the home of Angie Walls at 6:00 p.m. on February 27, 2005. Walls was appellant's ex-wife and a friend of Hawkins. Hawkins asked to borrow Walls's car and then she and appellant drove it to the Black Oak Casino where they spent the evening.[4] Appellant and Hawkins left the casino the next morning. Hawkins was tired, she asked appellant to drive the borrowed car and handed him the key. She did not see appellant inspect the key. Hawkins was asleep at the time of the crash and denied retrieving any personal items from the car after she got out.

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identified by law enforcement. Officer Gisler said these "second numbers" vary from year to year and the National Insurance Crime Bureau informs law enforcement officials of the location of such numbers on various vehicles. Gisler said the registration to Debra Brachtenbach's Saturn matched this secondary VIN.

[4] On cross-examination, Hawkins claimed she did not go to Walls's residence with the intention of borrowing a vehicle. However, when counsel asked how Hawkins got to Walls's residence, Hawkins claimed she could not remember. Hawkins also claimed she could not remember who accompanied her to Walls's residence or where she got the funds to gamble with despite her unemployment.

Hawkins said she told the CHP officer she was the driver because she thought appellant had a suspended license. She did not want appellant to get into trouble. She also admitted giving the officer a false name because she thought she had an outstanding warrant. She initially claimed she revealed her true identity to the officer at the hospital. However, upon further questioning, she admitted she did not make that disclosure. On redirect examination, Officer Green testified Hawkins never revealed her true identity. Rather, her true name was discovered after she was booked into Stanislaus County Jail and her fingerprints were identified. Hawkins acknowledged multiple prior convictions for receiving stolen property. On cross-examination, Hawkins also admitted a 1998 petty theft conviction, a 2004 conviction for possession of stolen property, and a 2007 misdemeanor conviction for receiving stolen property.

Hawkins also admitted that before the arrival of CHP officers, she and appellant discussed what story to tell law enforcement. They both told the officer the story about the cat. She claimed it was difficult to lie to the police but explained that she did so to protect appellant. She also said she was "panicked."

Rebuttal

Officer Green testified that Hawkins did not reveal her true name at the hospital despite Hawkins's testimony to the contrary. He said he did not discover her true identity until he ran her fingerprints after her arrest.

DISCUSSION

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT IN CALCRIM NO. 251 [UNION OF ACT AND INTENT: SPECIFIC INTENT OR MENTAL STATE]?

Appellant contends the charged offense (§ 496d) required knowledge and the trial court committed reversible error by failing to instruct sua sponte on CALCRIM No. 251.

Section 496d states in pertinent part:

> "(a) Every person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or

> extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle . . . from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in the state prison for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both."

CALCRIM No. 250 (union of act and intent: general intent), as given to the jury, stated:

> "The crime charged in this case requires the proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime of receiving a stolen vehicle, that person must not only have committed the prohibited act, but must do so with wrongful intent.
>
> "If a person acts with wrongful intent or when he or she intentionally does a prohibited act, however, it does not require that he or she intended to break the law. The act required is explained in instructions for that crime."

On appeal, appellant notes the prosecution theorized that Hawkins might have stolen the car and that appellant was guilty as an aider and abettor to receiving the stolen vehicle. Appellant points out that an aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose of committing, or of encouraging or facilitating commission of the offense. In view of the knowledge requirements of aiding and abetting, appellant submits that CALCRIM No. 251, rather than CALCRIM No. 250, was the appropriate instruction to give. CALCRIM No. 251 states:

> "The crime[s] [(and/or) other allegation[s]] charged in this case require proof of the union, or joint operation, of act and wrongful intent.
>
> "For you to find a person guilty of the crime[s] (in this case/of _____ <*insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1*> [or to find the allegation[s] of _____ <*insert name[s] of enhancement[s]*> true]), that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/[and/or] mental state). The act and the specific (intent/[and/or] mental state) required are explained in the instruction for the crime [or allegation].

"*<Repeat next paragraph as needed>*

"[The specific (intent/ [and/or] mental state) required for the crime of _____ *<insert name[s] of alleged offense[s] e.g., burglary>* is _____ *<insert specific intent>*.]"

A trial court must instruct the jury on the law applicable to a particular case, i.e., the general principles of law relevant to issues raised by the evidence. When an appellant claims a trial court failed to properly instruct on applicable legal principles, an appellate court reviews such a claim de novo. In conducting such review, the appellate court ascertains the relevant law and then determines the meaning of the instructions. The proper test is whether the trial court fully and fairly instructed the jury on the applicable law. To determine whether error has occurred, we must (a) consider the instructions as a whole and (b) assume that jurors are intelligent persons capable of understanding and correlating all the instructions that have been given. Appellate courts should interpret instructions, if possible, to support the judgment rather than defeat the judgment, if the instructions are reasonably susceptible of such interpretation. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Courts have historically held the offense of receiving stolen property is a general intent crime. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.) "Although receiving stolen property has been characterized as a general intent crime, the second element of the offense is knowledge that the property was stolen, which is a specific mental state." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) Expressed another way, the offense of receiving stolen property is a general intent crime with the specific mental state of knowledge. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985.) Guilty knowledge of the fact the property was stolen is an essential fact to be proved in a prosecution for receiving stolen property. However, such knowledge need not be acquired from personal observation of the fact. Guilty knowledge may be circumstantial and deductive. For example, possession of stolen property, accompanied by suspicious circumstances, will justify an inference that the property was received with knowledge

that it had been stolen. A defendant's admissions and contradictory statements combined with possession of stolen property alone are sufficient to support a guilty verdict. Further, false or evasive answers to material questions with reference to ownership of stolen property tend to prove guilty knowledge. (*People v. Bugg* (1962) 204 Cal.App.2d 811, 817.) Fraudulent intent is not an element of the crime which the prosecution must prove. (*People v. Wielograf*, *supra*, 101 Cal.App.3d at p. 494.) The absence of any such guilty intent is a defense which, if established, disproves the charge. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 476.)

In the instant case, the court instructed the jury in CALCRIM No. 376 (possession of recently stolen property as evidence of crime), CALCRIM No. 401 (aiding and abetting: intended crimes) and CALCRIM No. 1750 (receiving a stolen vehicle (Pen. Code, § 496d)). The court instructed the jury pursuant to CALCRIM No. 376:

> "If you conclude that the defendant knew he possessed property, and you conclude that the property had in fact been recently stolen, you may not convict the defendant of receiving a stolen vehicle based on those facts alone. However, if you also find that the supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed receiving a stolen vehicle. The supporting evidence need only be slight and need not be enough by itself to prove guilt.
>
> "You may consider how, where, and when the defendant possessed the property along with any other relevant circumstances tending to prove his guilt of receiving a stolen vehicle. Remember, that you may not convict the defendant of any crime unless you were convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

The court instructed the jury pursuant to CALCRIM No. 401:

> "To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that, one, the perpetrator committed the crime; two, the defendant knew that the perpetrator intended to commit the crime; three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime; and, four,

the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does in fact aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abetter [*sic*].

"If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abetter [*sic*]. However, the fact that a person was present at the scene of the crime or failed to prevent the crime does not by itself make him an aider or abetter [*sic*]."

CALCRIM No. 1750, as read to the jury, states:

"The defendant is charged with receiving a stolen vehicle, in violation of Penal Code section 496(d).

"To prove that the defendant is guilty of this crime the People must prove that: One, the defendant received, concealed, withheld from its owner, or aided in concealing or withholding from its owner a motor vehicle that had been stolen. And, when the defendant received, concealed, withheld from its owner or aided in concealing or withholding from its owner the motor vehicle, he knew that the motor vehicle had been stolen.

"Property is stolen if it was obtained by any type of theft. Theft includes obtaining the property by larceny. To receive property means to take possession and control of it. Mere presence, near, or access to the property is not enough."

Here, as the respondent points out, section 496d simply requires the People to prove that the defendant knew the property was stolen at the time he or she received it. Appellant insists section 496d is a "specific intent" offense. However, the offense in actuality is a general intent crime with the required element of knowledge, a specific mental state. (See *People v. Reyes, supra,* 52 Cal.App.4th at p. 985.) Appellant has not cited any case authority mandating the giving of CALCRIM No. 250 or 251 when the

crime charged is receiving stolen property. Here, CALCRIM No. 1750 addressed the knowledge element required to support a finding of guilt. Moreover, CALCRIM Nos. 103 (reasonable doubt), 104 (evidence), 220 (reasonable doubt), and 376 (possession of recently stolen property as evidence of a crime) emphasized the prosecution's burden to prove every element of the charged offense beyond a reasonable doubt. Both the prosecutor and defense counsel emphasized the special mental state of "knowledge" in their closing arguments.

Thus, the requisite mental state of "knowledge" was squarely before the jury and the court did not err by failing to instruct sua sponte in CALCRIM No. 251.

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT SUA SPONTE ON MISTAKE OF FACT AS A DEFENSE?

Appellant contends the trial court violated his right to due process of law by failing to instruct sua sponte on his mistake-of-fact defense pursuant to CALCRIM No. 3406. He specifically contends the court failed to inform the jury that his belief the car was not stolen did not have to be a reasonable belief.

As noted above, Rayanne Hawkins was the sole defense witness at trial. Hawkins claimed she borrowed the Saturn from appellant's ex-wife, Angie Walls, and then asked appellant to drive the vehicle home. Hawkins said she handed the key to appellant and did not recall him examining the key. During closing argument, defense counsel questioned whether his client had possession of the vehicle since Hawkins received the vehicle from Walls. Counsel emphasized there was no direct evidence that appellant had knowledge of the vehicle being stolen.

On appeal, appellant asserts he did not know the car had been stolen. He submits he mistakenly believed his ex-wife or friend, Hawkins, legally possessed the vehicle, and he drove the car under a claim of right. He points out Hawkins borrowed the Saturn from his ex-wife and that he and Hawkins drove to the Black Oak Casino, where they spent the evening. Appellant drove the vehicle home early the next morning because Hawkins said

she was too tired to drive. Hawkins also said she did not remember appellant inspecting the key before starting the ignition. In light of this evidence, appellant maintains the trial court was obligated to (1) instruct the jury on the mistake of fact or claim of right defenses and (2) inform the jury that appellant's belief the car had not been stolen did not have to be a reasonable belief.

In California criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) The trial court's sua sponte instructional obligation includes the obligation to instruct the jury with a specific defense if the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Breverman*, *supra*, 19 Cal.4th at p. 157.) However, there is no obligation to instruct a jury with a defense if the evidence supporting the defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.)

The CALCRIM pattern instruction on mistake of fact reads as follows:

> "The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.
>
> "If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ < insert crime[s]>.
>
> "If you find that the defendant believed that _____ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did

> not have the specific intent or mental state required for _____ < insert crime[s]>.
>
> "If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)." (CALCRIM No. 3406.)

A mistake of fact occurs where a person understands the facts to be other than they really are. (*People v. LaMarr* (1942) 20 Cal.2d 705, 710.) An honest and reasonable belief in the existence of circumstances which, if true, would make the charged act an innocent one, was a good defense at common law. In California, a person who commits an act or makes an omission under a mistake of fact that disproves his or her criminal intent, is excluded from those persons who are capable of committing crimes. (§ 26, par. Three; *People v. Russell, supra,* 144 Cal.App.4th at pp. 1424-1425.) Expressed another way, people do not act unlawfully if they commit acts based on a reasonable and honest belief that certain facts and circumstances exist which, if true, would render the act lawful. (*People v. Reed* (1996) 53 Cal.App.4th 389, 396.)

A trial court must instruct on a defense sua sponte if it appears that the defendant is relying on the defense or if substantial evidence supports the defense and it does not conflict with the defendant's theory of the case. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.) This sua sponte duty to instruct applies to the mistake of fact defense and the claim-of-right defense. Error in failing to instruct on these defenses is subject to the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836. Under this standard, a conviction of a charged offense may be reversed only if, after an examination of the entire cause, including the evidence, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Russell, supra,* 144 Cal.App.4th at pp. 1427-1429, 1432.)

Here, Rayanne Hawkins testified she and appellant met at Angie Walls's home at about 6:00 p.m. on February 27, 2005. Hawkins borrowed a Saturn vehicle from Walls

and Hawkins drove appellant to the Black Oak Casino, outside Sonora. Hawkins said neither she nor appellant had any knowledge the Saturn was stolen. Hawkins and appellant stayed overnight at the Black Oak Casino and left at 6:00 o'clock the next morning, with appellant at the wheel. Hawkins gave appellant the keys to the automobile, but she did not remember him examining the key before driving the vehicle. Upon the arrest of appellant and Hawkins, officers conducted a search of the interior of the vehicle as well as the persons of the arrestees. The officers found a "shaved" key bearing the Toyota name in the ignition, two shaved keys in appellant's front pants pocket, and four keys on the passenger-side floorboard. Two of the four keys on the floorboard had been tampered with.

On direct examination, Hawkins denied that she and appellant had personal belongings in the Saturn. Hawkins said she was asleep when the accident occurred. When Officer Green first interviewed her, Hawkins said she was the driver because she was worried appellant would get in trouble because of his suspended license. Hawkins also initially gave officers a false identity because she thought she had a warrant. On cross-examination, Hawkins said she was asleep when the car wrecked and she awakened not knowing what was going on. Before law enforcement arrived, she and appellant talked about what they were going to say. When a uniformed officer arrived, Hawkins gave the name and birth date of her sister, Sara Van Winkle. She and appellant told the officer a cat ran in front of the car causing Hawkins to run into the pole. The officer came back and said that Hawkins was lying and that she was actually someone else.

The somewhat meandering testimony of Rayanne Hawkins supplied a minimal and insubstantial basis for a mistake of fact defense in the instant case. The only statements conceivably related to the defense of mistake of fact were Hawkins's summary denials that she and Hawkins had knowledge that the vehicle was stolen. Under these circumstances, we cannot say appellant relied upon the defense of mistake of fact or that there was substantial evidence to support the defense. (*People v. Russell*,

supra, 144 Cal.App.4th at pp. 1427.) To the extent any error occurred, such error was harmless. The court expressly instructed the jury in CALCRIM No. 1750 that receiving a stolen vehicle required the People to prove that the charged defendant "knew that the motor vehicle had been stolen," i.e., had been obtained by any type of theft. This instruction clearly sets forth the defense that if defendant lacked knowledge of the stolen nature of the vehicle, he would be not guilty of violating section 496d. The failure to instruct on mistake of fact did not remove appellant's defense from the case and was adequately covered by the instructions as given.[5] Therefore, reversal is not required.

III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT ON THE BURDEN OF PROOF AS IT RELATED TO HIS DEFENSE?

Appellant contends the trial court committed reversible error by failing to inform the jury of the allocation and weight of the burden of proof relating to his defense. He specifically contends no instruction was given concerning reasonable doubt as to the existence of the knowledge element.

Evidence Code section 502 states:

> "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or

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[5] Appellant further contends his trial counsel was ineffective by failing to request a jury instruction on "unreasonable belief." Under the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show trial counsel's performance was deficient under a standard of reasonableness. He or she must also show that prejudice resulted. (*People v. Staten* (2000) 24 Cal.4th 434, 450-451.) Reviewing courts will reverse convictions on direct appeal on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924.) The record on appeal does not reflect the absence of a rational tactical purpose and appellant's claim must be rejected.

> nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."

Evidence Code section 501 provides that when a statute allocates the burden of proof to a defendant on any fact relating to his or her guilt, the defendant is merely required to raise a reasonable doubt as to that fact. When a statute allocates the burden of proof to a defendant as to a fact collateral to guilt, he or she may be required to prove that fact by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478-479.) A trial court has a sua sponte duty under Evidence Code section 502 to instruct the jury correctly on the defendant's burden of proof as to a defense. However, the trial court is required to instruct on a defense--and the defendant's burden of proof as to the defense--only if substantial evidence supports the defense. Substantial evidence is that which is reasonable, credible, and of solid value. On review, the appellate court makes an independent determination whether substantial evidence to support a defense existed. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054-1055.)

In the instant case, appellant contends he needed only to raise a reasonable doubt as to the existence of the knowledge element of section 496d and the trial court committed reversible error by failing to instruct the jury accordingly. Respondent agrees that appellant only needed to raise a reasonable doubt as to the existence of the knowledge element. However, respondent maintains the court adequately covered the relevant legal concepts with the instructions it gave to the jury. Respondent specifically cites CALCRIM No. 220 (reasonable doubt), CALCRIM No. 225 (circumstantial evidence: intent or mental state), and CALCRIM No. 1750 (receiving a stolen vehicle).

CALCRIM No. 220 provided that a defendant in a criminal trial is presumed to be innocent, that presumption requires the People to prove a defendant guilty beyond a reasonable doubt, and the defendant is entitled to an acquittal unless the evidence proves him guilty beyond a reasonable doubt. CALCRIM No. 225 advised the jury that the People were required to prove that defendant did the charged acts and acted with a

particular mental state. The instruction further advised that the People were required to prove each fact essential to a finding of guilt beyond a reasonable doubt. CALCRIM No. 1750 informed the jury the People were required to prove that defendant received or concealed from its owner a motor vehicle that had been stolen and that defendant knew the vehicle had been stolen when he received or concealed it. CALCRIM No. 376 (possession of recently stolen property as evidence of a crime) reiterated that the jury could not convict the defendant of any crime unless jurors were convinced each fact essential to a conclusion of guilt had been proven beyond a reasonable doubt.

Appellant steadfastly maintains his "defense was that he believed that Rayanne Hawkins borrowed the Saturn and he had the right to drive the car." We have summarized the relevant portions of the record in issue II above and appellant's assertion of a "mistake of fact defense or claim of right defense" is belied by the record on appeal. Viewing all of the instructions as a whole, we conclude the court properly instructed the jury on the elements of the offense, the presumption of innocence and burden of proof beyond a reasonable doubt, and the sufficiency of circumstantial evidence, among many other relevant issues. The jury was well aware that appellant was entitled to an acquittal and finding of not guilty unless the evidence proved him guilty beyond a reasonable doubt. Under all of the facts and circumstances, the trial court did not err in failing to specifically inform the jury on the allocation and weight of the burden of proof relating to his purported defense.

IV. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON JURY MISCONDUCT?

Appellant contends the trial court committed reversible error by denying his motion for a new trial based upon jury misconduct.

A. Procedural History

On January 10, 2008, the jury returned verdicts finding appellant guilty of receiving a stolen vehicle (§ 496d). After the jury returned its verdict on the substantive count, the appellant elected to have the court try the truth of the prior conviction special allegations. On January 11, 2008, appellant admitted the truth of each special allegation in the interest of judicial economy.

On May 16, 2008, appellant filed a petition for release of identifying juror information (Code Civ. Proc., § 237) because defense counsel had reason to believe that jurors had access to information/evidence about appellant's criminal history at the time of their deliberations on the substantive count. On June 25 and August 1, 2008, after the prosecution filed a written response, the court issued minute orders granting the request and releasing the information to defense counsel and the defense investigator.

On October 10, 2008, appellant moved for a new trial, alleging the jurors were privy to appellant's arrest record or booking sheet at the time of their deliberations. Appellant submitted the jury foreperson understood the nature of the documents, offered them to the entire jury for review, and that several jurors read the materials prior to entering their verdict. The district attorney filed written opposition to the motion, contending it was not reasonably probable an outcome more favorable to appellant would have occurred had the "prison packet not inadvertently been given to the jury." The district attorney attached a declaration of the jury foreperson to the written response. The foreperson stated in pertinent part:

> "On January 10, 2008, when we, the jury, went to the jury deliberation room, I was chosen to serve as foreperson. Before we began deliberating, a bailiff gave me a huge file. When I opened the file, I noticed that the paperwork was marked 'Department of Corrections.' I saw the seal of the California Department of Corrections (CDC) and recognized it because my husband is employed by CDC. I believed the paperwork was probably a RAP sheet and closed it up.

> "As for seeing any other jurors looking at or reading the paperwork, I remember one gal, a single gal, picking up the stuff from in front of me. I don't know the length of time she may have looked at it. She then put it back in front of me.
>
> "I did not consider this CDC material at all in arriving at my verdict.
>
> "As for whether any of the other jurors talked about the CDC material or may have considered it in reaching a verdict, I would say definitely not. We were focused on the facts of the case. As the foreperson of the jury, I felt it was my duty to keep the jury focused on the facts of the case. The CDC documents were not a factor in our deliberations or in our decision. Everyone felt validated with the process. We felt a just decision was made based on the facts. We felt a good sense of justice after all was said and done. Everyone voted their conscience."

On October 20, 2008, the court conducted a contested hearing on the new trial motion and took the matter under submission. On October 24, 2008, the court denied the motion for new trial in open court. Citing *People v. Clair* (1992) 2 Cal.4th 629 (*Clair*) and *People v. Jordan* (2003) 108 Cal.App.4th 349, the court stated:

> "Here, all of the evidence points to the fact that the defendant was the driver of the car. He was arrested after the car crashed into a utility pole. An independent eyewitness saw two people get out of the car. A male got out of the driver side and the female out of the passenger side. That was corroborated by the position of the driver's seat and the finding of a . . . long hair in the passenger window. The long hair was similar to the passenger in that case, or the female, but totally dissimilar to Mr. Ruiz.
>
> "The only testimony that was favorable to the defendant was from Rayanne Hawkins. I don't believe she was a credible witness and her testimony was contradicted in no uncertain terms by independent witnesses and by the physical evidence. Based on that, by the Court's consideration of, in Jordan, where they said in that case that I believe it was a drug crime he'd been convicted of, a robbery charge previously, he was on parole for robbery, I don't believe this case rises to that level so the motion will be denied."

B. Applicable Law

1. Law Governing New Trial Motions

The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest abuse of discretion clearly appears. (*People v. Turner* (1994) 8 Cal.4th 137, 212, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Under California law, there is a strong presumption the trial court properly exercised that discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) In determining whether there has been a proper exercise of discretion, each case must be examined on its own facts. An appellate court must recognize that the trial court is in the best position to determine the genuineness and effectiveness of the showing in support of the motion. (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481.) The weight and credibility to be given evidence presented concerning a motion for new trial is for the trial court. (*People v. Gaines* (1962) 204 Cal.App.2d 624, 628.) The trial court's factual findings on a motion for new trial will be upheld, whether express or implied, if they are supported by substantial evidence. (*People v. Drake* (1992) 6 Cal.App.4th 92, 97.)

A motion for new trial can be granted only on motion of the defendant and either on the basis of one of the eight grounds specified in section 1181 or on nonstatutory grounds where failure to do so would result in a miscarriage of justice. (*People v. Whittington* (1977) 74 Cal.App.3d 806, 821, fn. 7.) In the instant case, appellant did not cite a specific numbered ground from section 1181 but did move to "vacate the January 2008 verdict based on juror misconduct." A court may grant a new trial "[w]hen the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property." (§ 1181, subd. 2.) In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. First, it must determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150. Second, if the evidence is admissible, the trial court must

determine whether the facts establish misconduct. Third, assuming a showing of misconduct, the trial court must determine whether the misconduct was prejudicial. A trial court has broad discretion in ruling on each of these issues. The rulings of the trial court will not be disturbed in the absence of a clear abuse of discretion. (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 704.)

2. Admissibility of Affidavits

Evidence Code section 1150 states:

> "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.
>
> "(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

Evidence Code section 1150 distinguishes between proof of objectively ascertainable overt acts and the subjective reasoning processes of the individual juror. Such processes cannot be corroborated or disproved. The improper influences that may be proved under Evidence Code section 1150 to impeach a verdict are those open to sight, hearing, and the other senses. Such influences are subject to corroboration. (*People v. Smith* (2007) 40 Cal.4th 483, 523-524.) A jury's verdict in a criminal case must be based on the trial evidence and not on extrinsic matters. Courts should exercise caution when undertaking inquiries about jury deliberations. That is because the preservation of secrecy in deliberations creates an atmosphere conducive to a frank, open discussion of the issues by trial jurors. Nevertheless, these concerns do not prevent the trial court from conducting a reasonable inquiry when it is faced with allegations of misconduct by a jury. (*People v. Wilson* (2008) 44 Cal.4th 758, 829.)

In the instant case, appellant did not attach an affidavit to the new trial motion he filed on October 10, 2008. Rather, appellant simply claimed that a private defense investigator interviewed a majority of the trial jurors and confirmed that each one of those jurors was aware of the CDC information in the jury room. Appellant also claimed that the foreperson spoke to the defense investigator and informed the investigator that (a) she understood the nature of the documents; (b) she offered the documents to the entire jury group for review; and (c) several jurors read the materials before entering their verdict. None of these assertions was embodied in an affidavit or declaration. California legal scholars have noted: "As in other motion practice . . . the motion for new trial is usually supported by affidavits, although the judge doubtless has discretion to allow oral testimony. . . . [¶] Affidavits that consist of generalities and conclusions, or that state essential factual matters on information and belief, are of little value." (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 116, p. 147.) Here, none of appellant's assertions were supported by documentary or testimonial evidence. Rather, they were generalized hearsay statements purportedly attributable to the efforts of an unnamed defense investigator. Appellant's unsubstantiated claims were an inadequate basis for obtaining a new trial.

The district attorney filed written opposition to the motion and attached the declaration of the jury foreperson.[6] In that declaration, the foreperson described the

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6 An affidavit is a written declaration under oath, made without notice to the adverse party. (Code Civ. Proc., § 2003.) An affidavit may be used to obtain the examination of a witness. (Code Civ. Proc., § 2009.) Whenever a matter is required or permitted to be proved by affidavit, such matter may with like force and effect be proved by a declaration under penalty of perjury. (Code Civ. Proc., § 2015.5.) The purpose of permitting a declaration under penalty of perjury, in lieu of a sworn statement, is to help ensure that declarations contain a truthful factual representation and are made in good faith. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223, disapproved on another point in *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 466.)

circumstances under which the appellant's CDC paperwork entered the jury room, the fact that she closed the paperwork after determining it was probably a "RAP sheet," and the fact a single, female juror picked up the paperwork, looked at it for an unknown length of time, and then placed it back in front of the foreperson. These were objective facts admissible under Evidence Code section 1150. (*People v. Lewis* (2001) 26 Cal.4th 334, 389.) The foreperson also declared that she did not consider the CDC material in arriving at her verdict, that other jurors did not talk about the CDC material or consider it reaching a verdict, and that the CDC documents were not a factor in the deliberations or decision of the jury. As appellant correctly observes, these statements verbally reflected the mental processes of the jury and were barred by Evidence Code section 1150. (*People v. Lewis, supra*, 26 Cal.4th at p. 389.)

C. Existence of Misconduct

The objectively ascertainable overt acts cited by the foreperson in her affidavit were admissible evidence in the hearing on appellant's new trial motion. When the evidence submitted in conjunction with a new trial motion is admissible, the trial court must determine whether the facts establish misconduct. (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.) Where some members of a jury may have seen a document mistakenly included in a packet of documents provided during deliberation, the possibility of its influence must be evaluated in light of the entire circumstances. Where such document is mistakenly or inadvertently delivered to the jury room, it generally constitutes ordinary error. With misconduct, prejudice is presumed and reversal is required unless there is no substantial likelihood that any juror was improperly influenced to the detriment of the defendant. In the case of ordinary error, however, prejudice must be shown. Reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have occurred. (*Clair, supra,* 2 Cal.4th at pp. 667-668; *Jordan, supra,* 108 Cal.App.4th at p. 364.)

D. Existence of Prejudice

Appellant contends the jury's receipt of extrajudicial information raises a rebuttable presumption of prejudice in the instant case. Appellant initially contends the California Supreme Court established one standard for evaluating prejudice in *People v. Clair, supra*, 2 Cal.4th 629 and then shifted away from that standard in the more recent cases of *People v. Zapien* (1993) 4 Cal.4th 929 (*Zapien*) and *People v. Harris* (2008) 43 Cal.4th 1269 (*Harris*).

In *Clair,* the trial court clerk in a capital case sent jurors an unredacted audiotape recording and transcript of an inculpatory conversation by defendant. The unredacted materials included references to defendant's prior criminal offenses. The clerk sent the materials into the jury room for a midtrial examination on the mistaken belief they had been received in evidence. She discovered her error while preparing to send exhibits into the jury room for deliberations on the guilt phase of the homicide case. The court brought these matters to the attention of counsel after the jury returned guilty verdicts and special findings. After the penalty phase of the case, the court conducted an examination of the jurors and determined none of the jurors had noted the precise references to defendant's past crimes. The court ultimately denied defendant's formal motion for new trial, concluding that any presumption of prejudice had been rebutted. The Supreme Court held the trial court mischaracterized the receipt of the unredacted materials as misconduct. The Supreme Court held no misconduct occurs when a jury innocently considers evidence that it was inadvertently given. Rather, all that appears is ordinary error and there is no presumption of prejudice. Instead, prejudice must be shown and reversal is not required unless there is a reasonable probability an outcome more favorable to the defendant would have resulted. In *Clair,* there was no reasonable probability of a more favorable outcome because the jurors did not note the precise references to the past offenses and the references themselves were brief, unemphatic, and

insignificant when considered in the context of defendant's case. (*Clair, supra,* 2 Cal.4th at pp. 665-669.)

In *Zapien,* a juror in a homicide case inadvertently heard an evening television report about threats made by the defendant on trial. The juror reported this information to the court and counsel the following day, the fourth day of deliberations at the penalty phase of the trial. The Supreme Court held the juror did nothing improper but nevertheless characterized his inadvertent receipt of information outside the court proceedings as "misconduct." Without citing to *Clair,* the Supreme Court said this "misconduct" created a presumption of prejudice which, if not rebutted, required a new trial. (*Zapien, supra,* 4 Cal.4th at pp. 993-994.) The Supreme Court ultimately concluded there was no prejudicial error because the juror promptly disclosed his inadvertent exposure to the television news report, the court admonished him to disregard the information, and the juror pledged he would do so. (*Zapien, supra,* 4 Cal.4th at pp. 996-997.)

In *Harris*, someone made a telephone threat against a juror in the penalty phase of a homicide trial. The father of the juror was the actual recipient of the threatening call. The father was a witness in a pending stolen vehicle case and law enforcement concluded the threat was probably related to the latter case rather than defendant Harris's homicide case. Once again failing to cite to *Clair,* the Supreme Court concluded under the totality of the circumstances surrounding the threat, there was no substantial likelihood the juror was actually biased against defendant Harris. In particular, the Supreme Court noted the threatening caller had asked for "Nick," the first name of the juror's father. That fact diminished the likelihood the threat was related to defendant Harris. (*Harris, supra,* 43 Cal.4th at pp. 1303-1306.)

We cannot explain the omission of the rule of *Clair* in *Zapien* and *Harris.* Although the Supreme Court did not expressly cite the rule of *Clair* in *Zapien* and *Harris,* the court nevertheless found no prejudice arising from the conduct of the jurors in light of

all of the facts and circumstances. To the extent the Supreme Court did somehow shift from *Clair*, we note that both *Zapien* and *Harris* are factually distinguishable from the instant case in that the inadvertent receipt of information in the earlier cases occurred outside the court proceedings. Here, in contrast, the questioned conduct consisted of inadvertent distribution of documentary materials to the jurors by courtroom personnel in the context of deliberations.

In *People v. Nesler* (1997) 16 Cal.4th 561, 579-580, the Supreme Court drew a distinction between "the improper receipt of *outside* information" and situations where "court officials furnished the jury with material that should not have been transmitted to them." (*Id.* at p. 580, fn. 4.) The instant case falls into the latter category described in *Nesler* and, in our view, the rule of *Clair* remains applicable. In other words, prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted. (*Clair*, *supra*, 2 Cal.4th at p. 668.) As the respondent points out, it is not reasonably probable a result more favorable to appellant would have occurred absent the inadvertent transmittal of the CDC papers in the instant case. Nothing in the record suggests the jury used those CDC papers in their deliberations. Moreover, the record contained strong evidence against appellant. From the totality of the circumstances, the jury could reasonably conclude appellant was driving a stolen car some 10 days after it was taken. The car had been repainted in that period of time and appellant used a "shaved" Toyota key to operate the Saturn vehicle. Law enforcement found two shaved keys in appellant's pocket and additional shaved keys on the passenger floorboard. Someone had glued a false VIN plate on the front dash and appellant's passenger, Rayanne Hawkins, had glue and a pocketknife in her possession. Both appellant and Hawkins lied to law enforcement officers, demonstrated little regard for the crashed vehicle, and exhibited evasive behavior at the scene of the car crash. Appellant responded with agitated speech and behavior upon questioning by Officer Green.

Given the foregoing facts and circumstances, it is not reasonably probable a result more favorable to appellant would have occurred had the CDC papers not been inadvertently sent into the jury room.

Further, even if the instant case entailed a presumption of prejudice as described in *Zapien*, the totality of the circumstances--the inadvertent furnishing of materials by court staff, the innocent receipt of materials by the jury foreperson, the unsubstantiated claims that jurors reviewed and relied upon CDC documents during deliberations, and the evasive and incriminating behavior by appellant and Hawkins at the scene--more than rebutted such a presumption. The trial court did not abuse its discretion by denying appellant's motion for new trial.

DISPOSITION

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

_____
Dawson, Acting P.J.

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Hill, J.